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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

STEPHEN CHANG and HONGYAN  
CHEN, ) No. C 07-3562 SBA  
Plaintiffs, )  
v. ) [PROPOSED] ORDER ON DEFENDANT  
MICHAEL CHERTOFF, Secretary, ) ROBERT S. MUELLER'S MOTION TO  
Department of Homeland Security; ) DISMISS  
ROBERT S. MUELLER, III, Director of the )  
Federal Bureau of Investigation, )  
Defendants. )

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## I. BACKGROUND

Plaintiff asks the Court to compel Defendants to adjudicate his adjustment of status application. Defendant Robert S. Mueller contends that because the Federal Bureau of Investigation (“FBI”) does not process immigration applications, and no court has found jurisdiction over the FBI in immigration cases, the Complaint against Robert S. Mueller should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

## II. LEGAL STANDARD

A challenge to the court's jurisdiction under Rule 12(b)(1) may be either on the face of the pleadings (a facial attack) or by presenting extrinsic evidence to refute the facts alleged in the complaint (a factual attack). White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). “In a facial attack,

1 the challenger asserts that the allegations contained in a complaint are insufficient on their face to  
 2 invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).  
 3 In evaluating a facial attack, the court accepts as true the factual allegations in the plaintiff's  
 4 complaint. Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). Here, Defendant Robert S.  
 5 Mueller's motion to dismiss presents a facial attack on Plaintiffs' Complaint. Thus, the Court will  
 6 accept as true Plaintiffs' factual allegations.

### 7 III. ANALYSIS

8 Since March 1, 2003, the Department of Homeland Security has been the agency responsible  
 9 for implementing the Immigration and Nationality Act. See 6 U.S.C. §§ 271(b)(5), 557.  
 10 Furthermore, the FBI's investigation involves a discretionary function. See Yan v. Mueller, No. H-  
 11 07-0313, 2007 WL 1521732, at \*6 (May 24, 2007) ("The evidence shows that the delay is due, not  
 12 only to the volume of requests that the FBI receives, but also to the FBI's exercise of discretion in  
 13 determining the timing for conducting the many name check requests that it receives and the manner  
 14 in which to conduct those checks."); Li v. Chertoff, et al., 482 F. Supp. 2d 1172, 1179 (S.D. Cal.  
 15 2007) ("Additionally, Plaintiff has not pointed to any statute or regulation requiring the FBI to  
 16 complete her name check in any period of time, reasonable or not."); Sozanski v. Chertoff, et al.,  
 17 No. 06-cv-0993, 2006 WL 4516968, at \*1 (N.D. Tex. Dec. 11, 2006) (holding that federal district  
 18 courts lack jurisdiction to compel the FBI to perform name checks in adjustment of status cases).  
 19 The APA precludes review of agency actions that are committed to agency discretion by law.  
 20 5 U.S.C. § 701(a)(2).

21 Mandamus is an "extraordinary remedy" available only to compel a "clear, nondiscretionary  
 22 duty." Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988); Zahani v. Neufield, No. 6:05 CV  
 23 1857, 2006 WL 2246211, at \*2-\*3 (M.D. Fla. June 26, 2006) (holding that, because alleged delay  
 24 resulted from need for FBI background checks, "even if this Court could intervene, it would not.").  
 25 Plaintiff identifies no law or regulation that imposes a nondiscretionary duty upon the FBI to  
 26 complete Plaintiff's background check immediately or in a certain manner. Accordingly,  
 27 mandamus is unavailable because the FBI already is taking action, and Plaintiff "simply wish[es]  
 28 to force [the FBI] to [act] in a more expeditious manner." Mustafa v. Pasquerell, No. SA05CA-658-

1 XR, 2006 WL 488399, at \*5 (W.D. Tex. Jan. 10, 2006). Because the FBI does not process  
2 immigration applications, and because the FBI's investigation involves a discretionary function,  
3 Defendant Robert S. Mueller shall be dismissed from the Complaint. Konchitsky v. Chertoff, No.  
4 C-07-00294 RMW, 2007 WL 2070325, at \*6-7 (N.D. Cal. July 13, 2007); Dmitriev v. Chertoff, No.  
5 C 06-7677 JW, 2007 WL 1319533, at \*4 (N.D. Cal. May 4, 2007)

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Complaint against Defendant Robert S. Mueller is hereby  
8 DISMISSED WITH PREJUDICE.

9 Dated: October \_\_, 2007

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SAUNDRA B. ARMSTRONG  
11 United States District Judge  
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